

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JAN 13 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0214-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
NICHOLE ANTOINETTE MOTEN,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20051876, CR-20051860, and CR-20060011

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller

Tucson
Attorneys for Petitioner

E S P I N O S A, Presiding Judge.

¶1 In this petition for review, Nichole Antoinette Moten challenges the trial court's order denying her petition for post-conviction relief in three causes, pursuant to Rule 32, Ariz. R. Crim. P. She reiterates the claims she raised below, contending the court erred when it revoked probation in the three causes, rejected her related claim of ineffective assistance of counsel, and sentenced her to presumptive prison terms. She also argues that she was at least entitled to an evidentiary hearing on the claims she raised. We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion, *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007), and we find no such abuse here.

¶2 Pursuant to a plea agreement, Moten was convicted of reckless child abuse not likely to cause death or serious injury in CR-20051860 and placed on ten years' intensive probation supervision in December 2005. Pursuant to a separate plea agreement, she was convicted of fraudulent scheme and artifice and attempted theft by control in CR-20051876, and sentenced, also in December 2005, to a mitigated prison term of 2.5 years on the theft count¹ and placed on a seven-year term of intensive probation supervision on the conviction of fraudulent scheme and artifice. And in CR-20060011, she was convicted pursuant to a plea agreement of robbery and placed on four years' probation in August 2006, to be served concurrently with the other probationary terms. The state filed a petition to revoke probation

¹After Moten sought post-conviction relief, she was placed on probation on this offense.

in all three causes in January 2007. In February, Moten admitted she had failed to pay court-ordered assessments in December 2006 and had failed to perform all of the requisite hours of community service. After the probation officer recommended that she be given an additional six weeks to comply with those requirements, the court set the matter for disposition in April 2007. Although Moten was physically present before the April hearing began, she left before the hearing and the court issued a warrant for her arrest. Moten was arrested in April 2008 and, after a disposition hearing, the trial court revoked probation and sentenced her to presumptive, concurrent prison terms of five and 3.5 years in the first case, the presumptive term of 1.5 years in the second case, to be served consecutively to the preceding five-year term and concurrently with the 3.5-year term, and the presumptive term of 2.5 years in the last case, also consecutively to the five-year term in the first case.

¶3 In her petition for post-conviction relief, Moten contended, inter alia, that the trial court had failed to consider the fact that she was unable to make the assessment payments and sentenced her to prison, in violation of the Supreme Court's decision in *Bearden v. Georgia*, 461 U.S. 660 (1983). She asserted the probation officer had been taking her entire paycheck, leaving her with nothing to live on or with which to support her children. Moten also claimed trial counsel had been ineffective for not raising this issue at the disposition. Moten challenged the sentences as well, contending the court improperly had found the fact that she had absconded was an aggravating circumstance. Moten argued the court was not permitted to consider her conduct after she was convicted of the underlying

offenses. The trial court denied relief in a minute entry ruling without holding an evidentiary hearing. In her petition for review, Moten essentially reiterates the claims summarized above. She also contends that, as to the first claim, she at least asserted a colorable claim that she had been unable to pay the assessments, entitling her at the very least to an evidentiary hearing on this claim.

¶4 In its order denying Moten’s petition, the trial court identified the claims she had raised and made clear the bases for its summary denial of relief, permitting us to meaningfully review its ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). No purpose would be served by rehashing the court’s order here. *See id.* Because Moten has not sustained her burden of establishing the trial court abused its discretion when it summarily dismissed the petition and denied Moten’s request for relief, we adopt the court’s ruling, except as noted below.

¶5 As the trial court pointed out, Moten did not raise the *Bearden*-based issue at the disposition and thereby waived it. However, the court rejected the related claim of ineffective assistance of counsel. But even assuming Moten had raised a material issue of fact as to whether she had been unable to make the payments, the court nevertheless did not abuse its discretion in rejecting this claim without an evidentiary hearing. The court made clear it would have revoked probation in any event, because Moten had also “failed to complete community service for several months in violation of the conditions of her probation.” It would have been justified in doing so. “Probation in Arizona is a matter of

privilege, not of right.” *State v. Portis*, 187 Ariz. 336, 338, 929 P.2d 687, 689 (App. 1996). The decision whether to place or continue a defendant on probation is left to the broad discretion of the trial judge. *See State v. Watkins*, 125 Ariz. 570, 572, 611 P.2d 923, 925 (1980). Thus, the trial court correctly concluded Moten could not establish the requisite prejudice to entitle her to relief on her ineffective assistance claim. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish successful claim of ineffective assistance of counsel, defendant must show counsel’s performance below prevailing professional norms and deficiency was prejudicial); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985) (same).

¶6 Moten also argues the court considered an inappropriate aggravating factor when it sentenced her to the presumptive prison terms. In imposing a presumptive term, a trial court is not required to articulate the circumstances it finds aggravating or mitigating. *See State v. Johnson*, 210 Ariz. 438, n.1, 111 P.3d 1038, 1041 n.1 (App. 2005). Having done so here, however, the court subjected its findings to scrutiny as to the propriety of the circumstances it had considered. Moten cannot be punished in this proceeding for her post-conviction conduct, including the fact that she had absconded and did not attend the scheduled disposition. *See State v. Baum*, 182 Ariz. 138, 140, 893 P.2d 1301, 1303 (App. 1995).

¶7 At the beginning of the disposition hearing, the state asked the court to sentence Moten to aggravated prison terms “due to the fact it’s her second petition, she

absconded at the point of disposition,” adding: “It looks like nothing else has gotten through to the defendant on the many chances that she has had to change her life.” Apparently in response to Moten’s explanation for having absconded, which was that she was five months pregnant and did not want to have her baby while in custody, the court stated:

[T]he Court does note by way of aggravating factors the fact that you failed to appear or that you did appear and left at the time of your disposition on April 5th, 2007. And that you absconded and were a fugitive until your arrest; but you didn’t turn yourself in, you didn’t get your baby situated and then come back and face the music, instead you were arrested on the 21st of April of this year.

From this language, it appears the court did consider the fact that Moten had absconded to be an aggravating circumstance.

¶8 Nevertheless, Moten has not established the trial court abused its discretion in denying her request for post-conviction relief on this ground. At the disposition hearing, the trial court had also found Moten’s two prior felony convictions and her criminal history were aggravating circumstances, balancing these factors against “the number of health issues you must deal with,” the only mitigating circumstance. The court made it clear in its order denying post-conviction relief that, even assuming it had considered an improper factor, it nevertheless would have imposed the same prison terms. Given the record before us, the court did not abuse its discretion in denying relief. It reconsidered the propriety of the presumptive prison terms without the improper factor, terms that are well within the statutory parameters and amply justified by the remaining, appropriate factors the court had

considered. *See State v. Webb*, 164 Ariz. 348, 355, 793 P.2d 105, 112 (App. 1990) (recognizing trial court has broad sentencing discretion, including the discretion to weigh aggravating and mitigating circumstances; sentence within correct range will not be disturbed absent abuse of that discretion).

¶9 We grant the petition for review but, for the reasons stated, we deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PETER J. ECKERSTROM, Judge